IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1246

STATE OF MARYLAND,

Petitioner,

v.

JOHN W. WHEELER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND APPENDIX

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Petitioner, State of Maryland, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in this case on December 12, 1977.

OPINIONS BELOW

The majority and dissenting opinions of the judges of the Court of Appeals of Maryland are reported at ___ Md. ___, 380 A.2d 1052 (1977). They also appear in the appendix to this petition (A. 4a). The notice of the summary denial of Petitioner's Motion for Reconsideration, dated January 20, 1978, appears in the Appendix to this Petition (A. 1a). The opinion and judgment of the Court of Special Appeals, filed March 16, 1977, which had affirmed Respondent's conviction and which was

reversed by the Court of Appeals, is reported at 35 Md. App. 372, 370 A.2d 602 (1977), and appears in the Appendix (A. 25a).

JURISDICTION

On December 12, 1977, the Court of Appeals of Maryland entered a judgment holding key portions of Maryland's Obscene Matter Act (Maryland Annotated Code, Article 27, Sections 417(2) and 418) unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitutional. Subsequently, a Motion for Reconsideration was filed by the State, and denied on January 20, 1978. The mandate of the Court issued on January 23, 1978. This petition is being filed within the 90 day period provided by 28 U.S.C. §2101 and Rule 22 of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Maryland court misstated and misapplied this Court's equal protection standard for local regulation of *unprotected* speech to strike down Maryland's Obscene Matter Act, and improperly used in its analysis hypothetical examples having no basis in reality to conclude that the Act irrationally and unconstitutionally distinguishes between employees of motion picture theatres and book stores?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Annotated Code, Article 27

§417. Definitions.

As used in this subtitle,

(1) *"Matter"* means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(2) *"Person"* means any individual, partnership, firm, association, corporation, or other legal entity, but shall not be construed to include an employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theatre which shows motion pictures if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages.

(3) *"Distribute"* means to transfer possession of, whether with or without consideration.

(4) *"Knowingly"* means having knowledge of the character and content of the subject matter.

§418. Sending or bringing into State for sale or distribution; publishing, etc., within State.

Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

STATEMENT OF THE CASE

Respondent John W. Wheeler is a clerk-cashier at the Swingers Life Book Store in Baltimore City, an entity operated by Swingers Life, Inc. According to the Court of Appeals of Maryland, Swingers Life "sold not only books and magazines ranging from the pristine to the pornographic, but also rubber supplies, prophylactics, condoms and 'marital aids'" such as "dildos or vibrators." 380 A.2d at 1056. A sign on the front of the first floor, commercial type premises warned: "You must be 21 years of age to enter." Wheeler is the only employee in the store on a given shift. He had no financial interest in the store other than salary and wages and apparently, whether by design or inattention, had less of an interest in the management of the enterprise. For example, he did not know the name of the president of Swingers Life, Inc., nor anything but the first names of management representatives who occasionally visited his store. He was never paid in person for his check was waiting in the store when he opened up on Fridays. He had not seen the drawer of his paychecks for a year and in his absence shelves were mysteriously stocked with magazines featuring nudes on the cover. His admitted duties consisted of opening up the store, making sales, bagging the books and merchandise, making deposits and going home.

On October 15, 1974, Wheeler was standing behind a "podium-type counter" near the front of the store when Detective John Dillon of the Baltimore City Police Department entered the establishment and selected a magazine entitled "Linda Lovelace, Star of Deep Throat." The officer handed the magazine to Wheeler with the purchase price of $5.20. Wheeler placed the magazine in a brown paper bag and handed the bag to the officer. Subsequently the magazine was reviewed by a judge and a criminal information was issued charging Wheeler with distributing obscene matter in

violation of Article 27, Section 418 of the *Annotated Code of Maryland.*

By way of a motion to dismiss and as an affirmative defense, Wheeler contended that Section 418 was facially unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Specifically, he argued that an exception in Section 417 from prosecution under Section 418 for employees of motion picture theatres who were neither officers of the entity nor possessors of a financial interest in the enterprise was unconstitutional because it did not also exempt book store employees from prosecution. The trial court rejected Wheeler's constitutional attack and a jury found him guilty of violating Section 418. As a result, Wheeler was fined $500.00.

On appeal to the Court of Special Appeals, Wheeler renewed his equal protection challenge to the Maryland Obscene Matter Act. In an unanimous opinion, the Court rejected his contentions, holding that a rational basis existed for the legislative distinction between employees of book stores and employees of motion picture theatres:

> [W]e note that in a motion picture theatre there is not ordinarily any necessity for an employee, except the projectionists, to handle the film. In fact, it is highly doubtful that anyone other than the projectionist comes in contact with the film itself, and even his contact is limited. A seller of books and magazines can hardly make a sale without in some manner coming into physical contact with the item sold. Furthermore, while controls may be placed so as to regulate the age of all who enter the theatre to see the film, no such controls are present when obscene material, such as the magazine in the instant case, is once removed from the seller's premises. Patently, it is unlikely that a film will be transported from the motion picture establishment so as to become available for viewing by juveniles.

35 Md. App. at 377, 370 A.2d at 606.

In so holding, the Court of Special Appeals recognized that under the traditional equal protection analysis applicable to economic regulation, wide discretion is afforded the legislature in making step-by-step determinations regarding the evils it attacks. 35 Md. App. at 378, 370 A.2d at 606. Finally, the Court stated that Wheeler had offered no evidence other than the phraseology of Sections 417 and 418 to rebut the presumption of constitutionality afforded the classifiications. 35 Md. App. at 379, 370 A.2d at 607.

On certiorari to the State's highest court, the Court of Appeals of Maryland, the judgment of the Court of Special Appeals was reversed. In a sharply divided decision, the four judge majority first resolved two questions of statutory construction: (1) they held *sub silentio* that the prohibitions of Section 418 would have been applicable to *all* employees of book stores and motion picture theatres acting in furtherance of the prohibited transaction; and (2) they said that the Section 417 exception for motion picture theatre employees could not be read to effectively apply only to projectionists, but potentially extends to all theatre employees, including ticket sellers, ushers, refreshment stand salespersons and restroom attendants. 380 A.2d at 1056. Then the majority framed the relevant federal equal protection standard generally from *Reed v. Reed*, 404 U.S. 71, 76 (1971), and *Maryland State Board of Barber Examiners v. Kuhn,* 270 Md. 496, 507, 312 A.2d 216 (1973), sex discrimination cases, stating that the legislative classification must rest upon some ground of difference having a "fair and substantial relation to the object of the legislation." Applying this standard the majority rejected the "rational bases" found by the lower courts to support the classification:

We do not see the relevance in the degree to which the obscene matter is handled. In any event, it seems that a film projectionist, attaching the reels, threading the film in the projector, activating the projector, splicing broken film, and rewinding the film, comes into contact with the obscene matter no less than a salesclerk in a bookstore who accepts the article the purchaser has selected, puts it in a bag and hands it back upon payment of the purchase price. We point out again, that the exemption applicable to § 418 through § 417(2) is not confined to projectionists, but to all employees within the classification. Even though a ticket seller, usher or other employee does not come into physical contact with the film itself, they are furthering the distribution of the prohibited material. Nor do we believe, in the circumstances here, that the juvenile rationale is sufficient to support a reasonable basis. "Distribute" as defined by the statute "means to transfer possession of, whether with or without consideration." Code (1957, 1976 Repl. Vol.) Art. 27, § 417(3). The bookstore employee would not be criminally responsible, absent a conspiracy, for a further sale or distribution of the obscene matter to a third person by the original purchaser, although the original purchaser, if not within the exempted class, would then be subject to the Act. Further, the Legislature has fully covered the dissemination of obscene matter to juveniles. Code (1957, 1976 Repl. Vol.) Art. 27, §§ 416A-416G. We do not think that the mere possibility of further distribution after a sale in a bookstore, in itself, warrants the classification. The basic fallacy, however, in the reasoning of the Court of Special Appeals is that the statute cannot be read so that the exemption pertains only to the showing of motion pictures as such. Thus, an usher in the exempted class who distributes to the theatre patrons a program concerning the film being shown, which program itself constituted obscene matter, would not be subject to the prohibitions of § 418. The bookstore employee, however, or any other person not within the exempted class, who distributed that same program, would be subject to

> punishment for violation of the statute. Thus, the law operates on some persons and not upon others like situated or circumstanced.

380 A.2d at 1059.

Finally, the majority stated that "a classification based upon control of obscene films and pictures more lenient than those imposed on other obscene matter certainly could not serve as a rational basis for that classification in light of the governmental objective." *Id.* at 1060.

Consequently, the majority effectively invalidated Maryland's Obscenity Law by striking down both the challenged exception (Section 417(2)), and its basic prohibition (Section 418), over the objections of two dissenting judges who argued that the majority opinion ran counter to this Court's decisions applying the Equal Protection Clause to local economic regulation. 380 A.2d at 1063.[1]

[1] The dissenting judges argued:

> It is, of course, the function of a motion picture theatre to show motion pictures to its patrons, and not to distribute printed matter, while the function of a bookstore is to sell books and magazines. A theatre showing motion pictures may regulate who sees what is shown on the screen; the viewer has no means to disseminate the film beyond the confines of the theatre. In contrast, once printed matter is removed from a bookseller's premises, it and its corrupting influence may be distributed and redistributed without limit to anyone, including juveniles. Under § 417(3), a person who "transfer[s] possession" of obscene matter is a distributor subject to prosecution under § 418, as is a person who sells or "prepares, publishes, prints [or] exhibits" such matter. The legislature could properly take into account the remote nature of the contact of the exempted theatre employees with the actual showing of an obscene film, and rationally conclude that the limited reach of the film did not justify seeking to prevent its exhibition by punishing employees having no direct responsibility for its showing . . . . [T]he problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical and unscientific

Subsequently, the State asked the majority to reconsider its decision, pointing to a long line of decisions of this Court rejecting equal protection attacks on exemptions in penal and regulatory laws. In addition, the State profferred additional rational bases for the classification, including:

> 1. The fact that, other than a salesperson, there rarely are any other "employees" in an obscene book store.
>
> 2. The direct role of the book store sales clerk in the distribution of obscene matter.
>
> 3. His potentially active role in pandering.
>
> 4. His control over the obscene material.
>
> 5. The possibility of further distribution and resale of obscene publications.
>
> 6. The unusual enforcement problems attendant to prosecuting the sale of obscene books.
>
> 7. The separate regulation and possible prosecution of theatre employees under Maryland's motion picture censor law.

Without comment, on January 20, 1978, the Court of Appeals denied the State's Motion for Reconsideration.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURT HAS FUNDAMENTALLY MISSTATED AND MISAPPLIED THE APPLICABLE EQUAL PROTECTION TEST ESTABLISHED BY THIS COURT IN CASES OF ECONOMIC REGULATION.

At the outset, it is important to emphasize that this case raises no First Amendment questions and does not implicate any other fundamental right. The lower courts here quite appropriately recognized that obscen-

> though they be. That we may think that a legislative classification is unwise, does not justify our striking it down, so long as it is constitutional.

380 A.2d at 1063.

ity falls outside the protection of the First Amendment, *Miller v. California,* 413 U.S. 913 (1973), and the equal protection issue presented here and resolved by the lower courts is predicated on the obscenity of the underlying materials. Without the aura of the First Amendment, this case is reduced to one of the validity of economic regulation.

The majority opinion of the Court of Appeals gauged the classification created by Section 417(2) by what it terms the "fair and substantial relation" equal protection test. 380 A.2d at 1058. Under this standard, in order to comport with equal protection requirements, the legislative classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Id.*

Although the mere formulation of the standard aside from its application is not critical to this decision, the Maryland court failed to recognize that the terms "fair and substantial relation" have become code words for an intermediate equal protection test primarily applicable to sex- or gender-based classifications. *See Craig v. Boren,* 429 U.S. 190 (1976); *Reed v. Reed, supra.* Note, *The Supreme Court, 1976 Term,* 91 Harv. L. Rev. 1, 177-88 (1977). This intermediate standard is characterized by greater scrutiny of the governmental ends than that occurring under the traditional minimal rationality test. *Compare Weinberger v. Wisenfield,* 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation") *with McGowan v. Maryland,* 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it").

Obviously, this is not a sex discrimination case; nor is there a fundamental right affected or a "suspect" class involved. The classification at issue here must be gauged by the *McGowan* standard. Under this test, the measure of equal protection has been described variously as whether "the distinctions drawn have some basis in practical experience," *South Carolina v. Katzenbach,* 383 U.S. 301, 333 (1966), or whether the legislature's action falls short of "invidious discrimination." *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955). In *McDonald v. Board of Election Commissioners,* 394 U.S. 802 (1969), this Court said:

> Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. . . . With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

Id. at 808-09 (citations omitted). *See also Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976), *Idaho Department of Employment v. Smith,* ___ U.S. ___, 98 S. Ct. 327 (1977).

These wise principles have guided this Court in its treatment of equal protection challenges to penal or regulatory laws based on the claimed under-inclusiveness of statutory prohibitions or overbreadth of statutory exceptions. In *McGowan v. Maryland, supra,* this Court rejected an equal protection attack on statutory exemptions for the Sunday sale of merchandise; and in *Ferguson v. Skrupa,* 372 U.S. 726 (1963), it refused to invalidate a statute making it a misdemeanor for any person but a lawyer to engage in the business of debt adjusting. Similarly, in *City of New Orleans v. Dukes,* 427 U.S. 297 (1976), the Court upheld an ordinance excepting from its prohibitions against selling food from a pushcart vendors who had continually operated the same business within the same locality for eight years. In so holding the Court stated:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Legislatures may implement their program step by step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.

Id. at 303.[2]

In *Califano v. Jobst,* ___ U.S. ___, 98 S. Ct. 95 (1977), the Court upheld provisions of the Social Security Act which excepted from disqualification for disability benefits recipients of such benefits who married but denied the same benefits to a beneficiary who married a disabled person who was not already a recipient. In so doing, the Court said:

[2] In the last half century, *only one* statutory exception to a regulatory or penal law affecting economic matters has been invalidated by this Court under the Equal Protection Clause for lack of a rational basis. This occurred in Morey v. Doud, 334 U.S. 457 (1957), where the Court struck down an exception from a state currency exchange act for American Express orders. However, in City of New Orleans v. Dukes, 427 U.S. 297 (1976), Morey v. Doud was specifically overruled.

> The broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples. When so judged both the exception and its limits are valid. . . .
>
> Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction . . . .

Id. at 100-01.

And, significantly, in *Pendleton v. California,* 423 U.S. 1068 (1976), this Court summarily disposed of an equal protection challenge by a book store clerk to a penal statute which prohibited distribution of obscene materials but which contained an exception for motion picture operators or projectionists acting within the scope of their employment and with no financial interest in the premises. This decision, binding on the Maryland courts, flatly rejects the lower court's holding that no distinction can be drawn between movie theatres showing obscene films and obscene book stores, and between projectionists and book store clerks.

The State submits that these cases and the principles they espouse compelled a finding that the Section 417(2) exception comports with the Equal Protection Clause.

Section 417(2), just like any law challenged under the "minimum rationality" equal protection standard, must be accorded a presumption of constitutionality. Moreover, the burden is on the person challenging the statute to show an equal protection violation. *McGowan v. Maryland, supra* at 426-27. And in this case, the presumption stands unrebutted because the statutory classification "judged by reference to characteristics typical of the affected classes," *Califano v. Jobst, supra* at 100, has "some basis in practical experience." *South Carolina v. Katzenbach, supra* at 333.

Although it may take a number of "employees" to run a movie theatre (projectionist, ticket taker, ushers, etc.),

it rarely takes more than one to operate a book store, *viz.*, the sales clerk. And the nature of their contact with both the customer and the obscene matter, and more importantly their involvement or potential for involvement in the sale, distribution or showing, is substantially different. Movie theatre employees may have only a fleeting contact with the obscene film, if at all: *e.g.*, the projectionist may see the first few frames as he threads the projector or an usher walking up and down the aisles may catch glimpses of a film. And probably no single movie theatre employee, except for the projectionist, can be said to have control or possession of the product.[3] On the other hand, a sales clerk in a book store in fact directly handles, sells, and distributes the obscene matter.

As the Supreme Court of Washington noted when confronted with a constitutional challenge similar to the one made in this case:

> Book and magazine stores offer a wide range of materials from which both the customer and clerk may select at the time of sale. Each has an opportunity to choose that which will be sold or purchased. One the other hand, motion pictures are shown one reel at a time and the projectionist must exhibit those selected by the manager.

State v. J-R Distributors, Inc., 512 P.2d 1049, 1061-62 (Wash. 1973).

In many cases the sales clerk in a book store may encourage and direct a customer to more explicit and exotic materials. Even if such may not have occurred in this case, the mere possibility that it may and the

[3] Because only "knowing" violations of Section 418 are proscribed and because "knowledge of the character and content of the subject matter" of the obsence matter is an element of the crime, see Section 417(4), the relationship of the employee to the obscene matter and his opportunity to control or possess it are singulary important in the statutory scheme.

opportunity which exists for a book store employee to direct a customer to a particular publication or to cause a particular sale to be made is a significant factor which would justify subjecting that particular class of employees to prosecution. In contrast, once a patron has paid his way into a movie theatre, he has selected his fare and there is nothing a theatre employee can do to alter that situation. The "sale" has already been made and the employees simply enable the customer to see only what he has already paid for. Moreover, once sold by the clerk, an obscene book can be subsequently transferred or sold to another, even a juvenile; a theatre film presents no such problem.

As this Court noted in *Kaplan v. California*, 413 U.S. 115, 120 (1973):

> For good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely circulated books of this category to reach the impressionable young and have a continuing impact.

And again in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 n.7 (1973), this Court recognized that such a rational distinction could be made between obscene book stores and movie theatres:

> It is conceivable that an "adult" theater can — if it really insists — prevent the exposure of its obscene wares to juveniles. An "adult" bookstore, dealing in obscene books, magazines, and pictures, cannot realistically make this claim.[4]

The majority opinion of the lower court naively asserts that the State's "subsequent transfer" rationale fails because the book store purchaser who makes a later transfer would himself become criminally liable under Section 418. However, it blinks at reality to

[4] In the same vein, obscene books and magazines more than films can be cheaply and quickly duplicated, thus facilitating wide distribution. Cf. United States v. 12 200-Ft. Reels, 413 U.S. 123, 129 (1973).

contend that "subsequent resales" or transfers outside a fixed location could ever be detected and prosecuted except by happenstance, particularly in light of the great number of such transfers which could occur.

Additionally, the enforcement problems associated with obscene book stores are substantially different from those encountered in dealing with movie theatres displaying obscene or other movies. First, there are more such book stores than movie houses. Secondly, because a book store may consist entirely of a rented "store front" and "inventory," it is relatively easier for the principals of the enterprise to remain unknown to the police by playing an inactive role in the operation. Under these circumstances, the only way to effectively enforce the obscenity law against such book stores may be by taking action against the employees.[5] On the other hand, a motion picture theatre requires a large capital investment at a fixed site (with seats, restrooms, counters, projection booth, etc.) and is subject to stricter state regulations (Maryland's movie censorship laws) through which the principals of the enterprise can be more easily traced.

All of these significant differences justify the legislature's step-by-step approach to dealing with prosecution under § 418 of various "employees" of businesses exhibiting or distributing obscene materials. *See City of New Orleans v. Dukes, supra* at 303. The wisdom and validity of such an approach was recognized by a California appellate court and left undisturbed by this

[5] At Wheeler's trial, the judge upon noting the Respondent's unfamiliarity with the management of Swingers Life, observed:

> "I must say I am disturbed by the mysterious employer, mysterious circumstances of employment, and I think that this man is either knowingly or otherwise permitted himself to be used in a scheme in order to avoid and to evade the law and the more I hear about this case the more I feel that that is correct."

T. 37.

Court in *People v. Kuhns,* 132 Cal. Rptr. 725 (1976), *cert. denied sub nom., Kuhns v. California,* 431 U.S. 973 (1977). There, a book store clerk was convicted of violating a California pandering statute. He challenged on equal protection grounds two "exceptions" in the law: one which excepted from its prohibitions projectionists or motion picture operators with no financial interest in the premises; the second which excepted employees with no financial interest in the premises who had "no control, directly or indirectly, over the exhibition of the obscene matter." 132 Cal. Rptr. at 739. The California court said that the exceptions (which together resemble § 417(2)) did not offend the Equal Protection Clause. And the *Kuhns* decision is simply one of the great majority of cases which have rejected equal protection challenges to "exception" provisions in state obscenity laws. *See Pendleton v. California,* 423 U.S. 1068 (1976) (exception for motion picture operators or projectionists); *Star v. Preller,* 352 F. Supp. 530 (D. Md. 1972), (three-judge federal court upheld three exceptions in the Censor Board Law, *viz.,* the exception of salaried employees from prosecution, the exception for films exhibited for educational and charitable purposes, and the exception for newsreels); *Gould v. People,* 128 Cal. Rptr. 743 (1976) (exemption of projectionist); *People v. Haskin,* 127 Cal. Rptr. 426 (1976) (exemption of projectionists but not book store clerks, ushers, or ticket takers upheld); *State v. J-R Distributors, Inc., supra* (exception of projectionists but not book store clerks). *Carter v. State,* 388 S.W.2d 191 (Tex. Crim. App. 1965) (exemption of certain classes of motion pictures and newspapers from obscenity law upheld). *But see State v. Burgun,* 351 N.E.2d 1018 (Ohio App. 1976) (employee of peep show enterprise successfully challenged an exception for projectionists).[6]

[6] The court in State v. Burgun, 351 N.E.2d 1018 (Ohio App. 1976), apparently was not aware of this Court's summary disposition in Pendleton v. California, 423 U.S. 1068 (1976).

Unlike this Court and the majority of courts, which have upheld statutory exceptions similar to Section 417(2) by correctly applying the "minimum rationality" test, the lower court in this case has erroneously focused on "atypical examples," *Califano v. Jobst, supra* at 100, to justify its analysis. For example, by comparing a sales clerk in an obscene book store to a theatre usher distributing an obscene program, 380 A.2d at 1059, the lower court hearkens up an anachronism at best or griffins and phoenixes at worst. Moreover, the majority opinion thrives on unfounded notions that obscene book stores are populated with numerous innocent employees such as restroom attendants, popcorn vendors, and the like who have nothing at all to do with the obscene material. Reasoned equal protection analysis requires courts to focus on practical experience. *South Carolina v. Katzenbach, supra* at 333. This the Maryland court has failed to do.

Finally, the State contends that because of the separate regualtory and penal scheme for motion pictures set forth in Article 66A of the *Annotated Code of Maryland,* it cannot be said that an unconstitutional discrimination exists between book store employees and motion picture theatre employees. Although the later may be specifically exempted from one criminal section of Article 66A (§ 19), theatre employees are still liable for criminal acts under other provisions of the statute (§§ 2 and 17). Section 2 of Article 66A makes it a crime to sell, lease, lend, exhibit, or use a film unless it has been submitted to the Censor Board and approved or licensed by it. Section 17 also requires submission of the film to the Board for examination. Section 19(b) of Article 66A punishes the sale, lease, lending, exhibition, or use of a film without having secured approval and a license from the Board. The exception for theatre employees in § 19(b) is specifically confined only to "prosecution under this section."

In conclusion, the State maintains that there are a host of rational justifications for the distinction drawn by Section 417(2) between book store clerks and motion picture theatre employees, and that review by this Court is necessary to rectify a damaging decision which flatly contradicts its precedents both in areas of equal protection and obscenity.

II.

REVIEW BY THIS COURT IS NECESSARY TO ENSURE PRINCIPLED EQUAL PROTECTION ANALYSIS IN MARYLAND, MAINTAIN THE STATE'S AUTHORITY TO REGULATE THE DISTRIBUTION OF OBSCENE MATERIALS, AND PRESERVE A NOVEL AND LAUDABLE EXPERIMENT IN OBSCENITY LAW.

A vital concern in this case is the future shape of federal equal protection analysis in Maryland. The decision below is radically at odds with long-standing treatment of such questions, *see Matter of Trader,* 272 Md. 364, 325 A.2d 398 (1974), and *McGowan v. State,* 220 Md. 117, 151 A.2d 156 (1959), *aff'd,* 366 U.S. 420 (1961); with the constitutional analysis of Maryland's intermediate appellate court, *see Wheeler v. State,* 35 Md. App. 372, 370 A.2d 602 (1977); and with the handling of equal protection questions in precisely the same context by the United States District Court for the District of Maryland, *see Star v. Preller,* 352 F. Supp. 530 (D. Md. 1972) (three judge court). Moreover, both in formulation and application, the equal protection test employed by the lower court in this case imposes a more rigorous scrutiny on state classifications than sanctioned by this Court in cases involving mere economic regulation.[7] And because, as this case illustrates, no one can guess at what will satisfy the "substantially"

[7] Of course, the Court of Appeals is free to impose such rigorous burdens on state classifications as a matter of *state* constitutional law. But this case raises only a *federal* constitutional question which must be decided consistently with the decisions of this Court.

element of the lower court's formulation of the federal equal protection standard, a multitude of heretofore legitimate legislative classifications in Maryland are now in jeopardy.

The lower court decision, by invalidating the basic prohibitions of Section 418, in essence leaves Maryland without an obscenity law and places pending prosecutions in limbo.[8] And legislators are now in a quandry as to how to correct the alleged deficiencies. Must the General Assembly of Maryland now subject all employees or none to prosecution for distributing obscene material? Neither the United States Constitution nor decisions of this Court force States to adopt an "all or nothing" approach in an area of mere economic regulation. *City of New Orleans v. Dukes,* 427 U.S. 297 (1976).

Finally, the lower court decision, if permitted to stand, may help stifle a laudable and novel experiment among the States in their approach to obscenity law enforcement. Exceptions in state obscenity laws for classes of employees have recently become widespread.[9] *See supra* at 16-17. And in addition to the basic difference between obscene films and books, *see supra* at 13-16, such classifications are frequently justified as tending to promote dissemination of speech. *People v. Kuhns,* 132 Cal. Rptr. 725 (1976), *cert. denied sub nom., Kuhns v. California,* 431 U.S. 973 (1977); *State v. J-R Distributors, Inc.,* 512 P.2d 1049 (Wash. 1973). Because States bear the onus in terms of obscenity law enforcement, it is both unfair and unwise to tie their hands by an exacting equal protection scrutiny of such experiments.[10] States must be afforded an ample period of time to gauge the effect of such actions without the threat of invalidation for violating the Equal Protection Clause.

[8] The folly of the lower court majority's broad-brushed approach to the equal protection question was echoed and magnified in their unprecedented handling of the State law severability question. *Compare* Davis v. Wallace, 257 U.S. 478 (1922). Not only was the later-enacted § 417(2) exception invalidated but the general prohibitions of § 418 as well.

[9] Although many state obscenity laws may exempt certain movie theatre employees, few, if any, exempt book store employees.

CONCLUSION

In summary, Petitioner submits that review should be granted to rectify a fundamental misreading and misapplication of this Court's equal protection cases and to maintain the ability of the States to handle the difficult problems of obscenity law enforcement in a step-by-step fashion.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
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Assistant Attorney General,
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Assistant Attorney General,
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Baltimore, Maryland 21202
Attorneys for Petitioner.

[10] It was not until 1968 that the Maryland General Assembly exempted theatre employees from prosecution under Section 418.

APPENDIX

NOTICE OF DENIAL OF MOTION FOR RECONSIDERATION
(January 23, 1978)

COURT OF APPEALS OF MARYLAND
Courts of Appeal Building
Annapolis, Md. 21401

January 23, 1978

Bruce C. Spizler, Esq.
Assistant Attorney General
1 S. Calvert Building, 13th Floor
Baltimore, Maryland 21202

Re: John W. Wheeler v. State of Maryland
No. 66 — September Term, 1977

Dear Mr. Spizler:

The Court has considered the motion for reconsideration filed in the above entitled case and has denied said motion on January 20, 1978.

A copy of the mandate is enclosed.

The record is being returned to the Court of Special Appeals today.

Very truly yours,
JAMES H. NORRIS, JR.,
Clerk.

JHNjr/h
Encl.
cc: Burton W. Sandler, Esq.

MANDATE
(January 23, 1978)

In The
Court of Appeals of Maryland

September Term, 1955

No. 66

John W. Wheeler
v.
State of Maryland

To The Honorable The Judges Of The Court Of Special Appeals Of Maryland:

WHEREAS the case of *John W. Wheeler v. State of Maryland* came before you and wherein the judgment of the said Court of Special Appeals of Maryland was duly entered on the sixteenth day of March, 1977 as appears from the transcript of the record of the said Court of Special Appeals of Maryland which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated June 29, 1977; and

WHEREAS in the September Term, 1977 the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on December 12, 1977 by this Court that the judgment of the Court of Special Appeals be reversed; case remanded to your court for remand to the Criminal Court of Baltimore with direction to dismiss the indictment; costs to be paid by the Mayor and City Council of Baltimore.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause in conformity with the judgment of this Court above stated as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS the Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland this 23rd day of January, 1978.

James H. Norris, Jr.,
Clerk,
Court of Appeals
of Maryland.

Dissenting opinion by Murphy, C.J., in which Levine, J., concurs.

OPINION OF COURT OF APPEALS
OF MARYLAND
(December 12, 1977)

John W. Wheeler

v.

State of Maryland

No. 66

Burton W. Sandler, Towson, for appellant.

Bruce C. Spizler, Asst. Atty. Gen., Baltimore (Francis B. Burch, Atty. Gen. and Clarence W. Sharp, Asst. Atty. Gen., Baltimore, on the brief), for appellee.

Argued before MURPHY, C. J., and SMITH, DIGGES, LEVINE, ELDRIDGE, and ORTH, JJ.

ORTH, Judge.

We hold that §§ 417(2) and 418 of Maryland's Obscene Matter Act, Maryland Code (1957, 1976 Repl. Vol.) Art. 27, are unconstitutional on the ground that these sections violate the equal protection clause of the Fourteenth Amendment.

John W. Wheeler was convicted by a jury in the Criminal Court of Baltimore of distributing as obscene magazine in violation of § 418 of the Obscene Matter statute. He was punished by a fine of $500 and ordered to pay the costs. The Court of Special Appeals affirmed the judgment, *Wheeler v. State*, 35 Md. App. 372, 370 A.2d 602 (1977), and we granted a petition for a writ of certiorari. We reverse.

I.

By Acts 1967, ch. 394, § 1, the General Assembly repealed §§ 417, 418 and 418B through 425 of Art. 27 of the Maryland Code of 1957, title "Crimes and Punishments," subtitle "Obscene and Other Objectionable Publications," and enacted in lieu thereof new §§ 417,

418, and 419 through 425 under the subtitle "Obscene Matter." Section 418 proscribes the crime of which Wheeler was convicted. It appears in the 1976 Replacement Volume as originally enacted:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

"Person" is defined in § 417(2):

> "'Person' means any individual, partnership, firm, association, corporation, or other legal entity, but shall not be construed to include an employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theatre which shows motion pictures if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages."[1]

II.

The cardinal rule of statutory construction is to ascertain and carry out the real legislative intention. *Balto. Gas & Elect. Co. v. Board*, 278 Md. 26, 31, 358 A.2d 241 (1976). A statute should be construed according to the ordinary and natural import of the language used without resorting to subtle or forced interpretations for the purpose of limiting or extending its operation. *Burch v. State*, 278 Md. 426, 429, 365 A.2d 577 (1976); *Cearfoss v. State*, 42 Md. 403, 407 (1875). That is, we must confine ourselves to the statute as written, and may not attempt, under the guise of construction, to supply omissions or remedy possible defects in the statute. *In Re Appeals Nos. 1022 & 1031*, 278 Md. 174, 178, 359 A.2d 556 (1976). Thus, if there is no ambiguity or obscurity in the language of a statute,

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[1] The exemption was not in the 1967 Act. It was added by Acts 1968, ch. 619.

there is usually no need to look elsewhere to ascertain the intent of the Legislature. *Maryland Auto Ins. Fund v. Stith*, 277 Md. 595, 597, 356 A.2d 272 (1976). As we said in *Purifoy v. Merc.-Safe Dep. & Trust*, 273 Md. 58, 66, 327 A.2d 483, 487 (1974), "where statutory language is plain and free from ambiguity and expresses a definite and sensible meaning, courts are not at liberty to disregard the natural import of words with a view toward making the statute express an intention which is different from its plain meaning." All parts of a statute are to be read together to find the intention as to any one part, and all parts are to be reconciled and harmonized if possible. *Thomas v. State*, 277 Md. 314, 317, 353 A.2d 256 (1976). *See Harden v. Mass Transit Adm.*, 277 Md. 399, 406-407, 354 A.2d 817 (1976). Our most recent pronouncement on the matter appears in *Coleman v. State*, Md., 380 A.2d 49, decided 8 December 1977:

> "It is elementary that a statute should be construed according to the ordinary and natural import of the language used unless a different meaning is clearly indicated by its context, without resorting to subtle or forced interpretations for the purpose of extending or limiting its operation. *State v. Fabritz*, 276 Md. 416, 348 A.2d 275 (1975) [*cert. denied*, 425 U.S. 942, 96 S. Ct. 1680, 48 L. Ed. 2d 185 (1976)]; *State v. Zitomer*, 275 Md. 534, 341 A.2d 789 (1975) [*cert. denied sub nom. Gasperich v. Church*, 423 U.S. 1076, 96 S. Ct. 862, 47 L. Ed. 2d 87 (1976)]. In other words, a court may not as a general rule surmise a legislative intention contrary to the plain language of a statute or insert exceptions not made by the legislature. *St. Paul Fire & Mar. v. Ins. Comm'r*, 275 Md. 130, 339 A.2d 291 (1975); *Amalgamated Ins. v. Helms*, 239 Md. 529, 212 A.2d 311 (1965)."

We pointed out that in *Birmington v. Board*, 249 Md. 443, 239 A.2d 923 (1968), where it was evident that words were inadvertently omitted from a statute, the effect of which was to render the statute unconstitutional on its face, we held that "since the [Court] could

not invade the function of the legislature, it had no power to correct an omission in the language of a statute even though it appeared to be the obvious result of inadvertence." *Coleman* at 55. And we repeated what we said in "the oft-cited case" of *Schmeizl v. Schmeizl*, 186 Md. 371, 375, 46 A.2d 619 (1946), that " 'the doctrine giving the judge power to mould the statute in accordance with his notions of justice has no place in our law.' " *Coleman* at 55. In short, judicial preference may not be put before legislative intent.

Furthermore, penal statutes are to be strictly construed. *Howell v. State*, 278 Md. 389, 392, 364 A.2d 797 (1976). This was succinctly put over a century ago in *Cearfoss v. State, supra*, and holds fast today:

> "No man incurs a penalty unless the act which subjects him to it, is clearly, both within the spirit and letter of the statute. Things which do not come within the words are not to be brought within them by construction. The law does not allow of constructive offenses or of arbitrary punishment." Id. 42 Md. at 407.

Reading § 418 together with § 417(2) in light of these well known and oft repeated principles, we find no ambiguity or obscurity in the language of the statute, so there is no need to look elsewhere to ascertain the intent of the Legislature. The legislative purpose is clear — to deter the dissemination of obscene matter by making designated acts a crime punishable by imprisonment and fine. The all encompassing application of the prohibitions to any individual and every other legal entity, plainly the original intention, was limited by the 1968 amendment. By that amendment the plain intention was to exempt from criminal responsibility for the proscribed conduct employees of any individual and every other legal entity "operating a theatre which shows motion pictures," unless the employee is an officer thereof or has a financial interest therein other than receiving salary and wages. The word "employee" and the phrase "operating a theatre which shows motion pictures" must be construed according to their

ordinary and natural meaning, for there is no indication that the Legislature intended to use them in an abnormal sense. *Blue Cross v. Franklin Sq. Hosp.*, 277 Md. 93, 105, 352 A.2d 798 (1976). According to Webster's Third New International Dictionary of the English Language (unabridged 1968), an "employee" is "one employed by another usually in a position below the executive level and usually for wages." If a person is so employed by a legal entity operating a theatre showing motion pictures and is not an officer thereof and has no financial interest therein, he is within the ambit of the exemption and without the proscriptions of the statute. He may, under the clear and unambiguous statutory provisions, with impunity, engage in the conduct § 418 prohibits. We are not at liberty to bring about a different result by inserting or omitting words to make the statute express an intention not evidenced in its original form. The word "employee" may not be limited beyond the limitations set out in the statute. It may not be construed, for example, to mean only the film projectionist. It must include the theatre manager, ticket sellers, ushers, refreshment stand salespersons, restroom attendants and all other persons meeting the exemption criteria while acting in the course of their employment. The Legislature specified only two conditions under which an employee of a legal entity operating a theatre which shows motion pictures is excluded from the exemption. This penal statute is to be strictly construed. Considering the clear and unambiguous language of the statute in its natural and ordinary signification, we cannot find that the Legislature contemplated other conditions, such as the nature of the duties performed by an employee, which would defeat the exemption. The statute, therefore, establishes two classes. Any individual, partnership, firm, association, corporation, or other legal entity, except an employee of any such legal entities operating a theatre which shows motion pictures, if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages, constitute the first class. Those

persons exempted from the first class constitute the second class. A member of the first class is guilty of a misdemeanor and subject to imprisonment and fine if he violates the provisions of § 418. A member of the second class is not.

III.

Swingers Life, Inc. operated a "bookstore" in Baltimore City which sold not only books and magazines ranging from the pristine to the pornographic, but also rubber supplies, prophylactics, condoms and "marital aids," described at the trial as including "dildos or vibrators or electrical devices of some type or another." A sign on the front of the first floor, commercial type premises of the store warned: "You must be 21 years of age to enter." It is plain that Swingers Life, Inc. was not a legal entity operating a theatre showing motion pictures.

Wheeler had been employed by Swingers Life, Inc. for two and a half years as a cashier. He described his duties thus:

> "I just stand behind the cash register, behind the counter and people, customers pick up the stuff and bring it up there. I just ring it up."

His testimony to the effect that he was merely an employee of the corporation with no financial interest in the business other than his salary was not contradicted.

Wheeler was standing behind a "podium-type counter" toward the front corner of the store opposite the doorway, when Detective John Dillon, assigned to the Criminal Investigation Division of the Baltimore City Police Department, entered the establishment and selected a magazine entitled "Linda Lovelace, Star of Deep Throat." The officer handed the magazine to Wheeler with the purchase price of $5.20. Wheeler placed the magazine in a brown paper bag and handed the bag to the officer. This sale was the basis of the conviction.

Wheeler does not dispute that he sold obscene matter in this State. He seeks to set aside his conviction, however, on two grounds: (1) he did not sell obscene matter "knowingly" as required by the statute because the evidence was legally insufficient to establish scienter on his part; and (2) § 418, considered with § 417(2), is unconstitutional on its face in that it denies him equal protection of the laws.[2] We do not reach the first ground because we agree that § 418, in light of § 417(2), is constitutional on its face.

IV.

The equal protection clause of the Fourteenth Amendment has been said by some to be "undoubtedly one of the majestic generalities of the Constitution." *Trimble v. Gordon,* 430 U.S. 762, 777, 97 S. Ct. 1459, 1468, 52 L. Ed. 2d 31 (1977) (Rehnquist, J. dissenting). Its meaning and scope have troubled the Supreme Court almost as much as has the definition of obscenity. Mr. Justice Rehnquist, tracing the history of the clause and offering a critique of the Court's decisions in his dissenting opinion in *Trimble,* declared that during the period of more than a century since its adoption, the Court had not developed a consistent body of doctrine which could reasonably be said to expound the intent of those who drafted and adopted that clause. Nor had it recognized that those who drafted and adopted the clause had rather imprecise notions about what it meant, and thereupon evolved a body of doctrine which both was consistent and served some arguably useful purpose. "Except in the area of the law in which the Framers obviously meant it to apply — classifications based on race or national origin, the first cousin of race — the Court's decisions can fairly be described as an

[2] "No State shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Wheeler presented three other questions in his brief but withdrew them at oral argument before us in the face of a motion to dismiss them made by the State on the ground that they were not included in his petition for a writ of certiorari.

endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle." *Trimble* at 777, 97 S. Ct. at 1469. Aware that this view is not without merit, we, nevertheless, see in the Court's opinions a certain consistency of rule even if not of application.

Equal protection analysis requires strict scrutiny of legislative classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Classifications based upon race, alienage, and national origin are inherently suspect.[3] When fundamental rights or a suspect class are involved, the classification must be subjected to close judicial scrutiny and must be justified by a compelling state interest. *See, e.g.,* as to fundamental rights, *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (right to privacy); *Bullock v. Carter,* 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972) (right to vote); *Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) (right to interstate travel); *Williams v. Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) (1st Amendment rights); *Skinner v. Oklahoma,* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (right to procreate); *State v. Schuller,* 280 Md. 305, 372 A.2d 1076 (1977) (1st Amendment rights). *See generally, Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976); *San Antonio School District v. Rodriguez,* 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16, *reh. denied,* 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418 (1973). As to suspect classes, *see, e.g., Graham v. Richardson,* 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971) (alienage); *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (race);

[3] It may be that discrimination based upon sex is within the ambit of suspect classifications. *See Frontiero v. Richardson,* 411 U.S. 677, 93 S. Ct. 1764, 36 L.Ed. 2d 583 (1973) in which four members of the Court so held. *See also Md. St. Bd. of Barber Ex. v. Kuhn,* 270 Md. 496, 506, 312 A.2d 216 (1973); 6 U. Balt. L. Rev. 313, 322-323, n.55 (1977); Note, 29 Okla. L. Rev. 711 (1976).

McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964) (race); *Oyama v. California,* 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249 (1948) (national origin); *Korematsu v. United States,* 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944) (national origin).

Under "traditional" equal protection analysis, a legislative classification must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 97 S. Ct. 1898, 52 L. Ed. 2d 513 (1977); *Massachusetts Bd. of Retirement v. Murgia, supra; Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976); *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973); *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); *McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911). This is known as the "reasonable basis" test, sometimes termed the "rational relationship" test or the "fair and substantial relationship" test, and has been consistently applied by this Court. *Aero Motors v. Adm'r M.V.A.,* 274 Md. 567, 574-576, 337 A.2d 685 (1975) and cases cited therein; *Bowie Inn v. City of Bowie,* 274 Md. 230, 240-241, 335 A.2d 679 (1975); *Prince George's Co. v. McBride,* 268 Md. 522, 531-532, 302 A.2d 620 (1973); *Adm'r, Motor Veh. Adm. v. Vogt,* 267 Md. 660, 671-673, 299 A.2d 1 (1973); *Police Comm'r v. Siegel, Etc., Inc.,* 223 Md. 110, 130-134, 162 A.2d 727, *cert. denied,* 364 U.S. 909, 81 S. Ct. 273, 5 L. Ed. 2d 225 (1960).

The statute here involves neither a suspect class nor a fundamental right. Uncertain as other matters with regard to obscenity may be, the Supreme Court has categorically settled that obscene material is unprotected by the First Amendment. *Miller v. California,* 413 U.S. 15, 23, 93 S. Ct. 2607, 37 L. Ed. 2d 419, *reh. denied,* 414 U.S. 881, 94 S. Ct. 26, 38 L. Ed. 2d 128

(1973). Thus, the reasonable basis test is applicable. We said in *Md. St. Bd. of Barber Ex. v. Kuhn,* 270 Md. 496, 507, 312 A.2d 216, 222 (1973) that this test requires "at a minimum, that a statutory classification bear some 'rational relationship' to a legitimate state purpose . . .; or that the legislative classifiication rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . ." (Citations omitted). "[A] classification made by a Legislature is presumed to be reasonable in the absence of clear and convincing indications to the contrary, and the person who assails it has the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Tatelbaum v. Pantex Mfg. Corp.,* 204 Md. 360, 370-371, 104 A.2d 813, 820 (1954), citing *Lindsley v. Natural Carbonic Gas Co., supra,* and *Salsburg v. State,* 201 Md. 212, 94 A.2d 280 (1953), *aff'd,* 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281 (1954). What we said in *Kuhn* and *Tatelbaum* is the substance of the *Lindsley* test which we set out in full in *Adm'r Motor Veh. Adm. v. Vogt,* 267 Md. at 671, 299 A.2d at 7, noting: "While more than sixty years have passed since that decision, in the course of which many cases have been decided on the same issue, the principles enunciated there have lost none of their vitality." *Id.* at 672, 299 A.2d 1. We repeated the *Lindsley* test in *Aero Motors v. Adm'r, M.V.A.,* 274 Md. at 574-575, 337 A.2d 685, affirmed its vitality and applied it.

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have relevance to the purpose for which the classification is made." *Baxatrom v. Herold,* 383 U.S. 107, 111, 86 S. Ct. 760, 763, 15 L. Ed. 2d 620 (1966). It was put this way in *Police Comm'r v. Siegel, Etc., Inc.,* 223 Md. at 131, 162 A.2d at 737: " 'The Equal Protection Clause does not require that every state regulatory statute apply to all in the same business, but a statutory discrimination must be based on differences reasonably related to the purpose of the act in which it is found.' " And in *Prince George's Co. v. McBride,* 268

Md. at 531, 302 A.2d at 624, we said: "Compliance with the Equal Protection Clause requires that legislative classification rest upon some ground of difference having a fair and substantial relation to the object of the legislation." We summed it up thus in *Salisbury Beauty Schools v. St. Bd.*, 268 Md. 32, 60, 300 A.2d 367, 383 (1973):

> "If all persons who are in like circumstances or affected alike are treated under the laws the same, there is no deprivation of the equal protection of the law. Conversely, a law which operates upon some persons or corporations, and not upon others like situated or circumstanced or in the same class is invalid."

The object of the Obscene Matter law is evident from the title of the 1967 Act. It was enacted "generally to revise the laws of the State pertaining to obscene matter; defining and *prohibiting the publication, printing, sale and distribution of such matter* . . . ." (Emphasis supplied). To be valid, the exemption of motion picture theatre employees would have to rest upon some ground of difference having a fair and reasonable relation to the prohibition against the publication, printing, sale and distribution of obscene matter, or have a rational relationship to the legitimate state purpose.

The Court of Special Appeals thought that § 418 was constitutional "in that there is a rational basis for the legislative distinction between employees of bookstores and employees of motion picture theatres." *Wheeler,* 35 Md. App. at 378, 370 A.2d at 606. The rational basis it found was that "[i]n a motion picture theatre there is not ordinarily any necessity for an employee, except the projectionists, to handle the film. In fact, it is highly doubtful that anyone other than the projectionist comes in contact with the film itself, and even his contact is limited. A seller of books and magazines can hardly make a sale without in some manner coming into physical contact with the item sold. Furthermore, while controls may be placed so as to regulate the age of all

who enter the theatre to see the film, no such controls are present when obscene material, such as the magazine in the instant case, is once removed from the seller's premises. Patently, it is unlikely that film will be transported from the motion picture establishment so as to become available for viewing by juveniles." *Id.* at 377, 370 A.2d at 606. We do not see the relevance in the degree to which the obscene matter is handled. In any event, it seems that a film projectionist, attaching the reels, threading the film in the projector, activating the projector, splicing broken film, and rewinding the film, comes into contact with the obscene matter no less than a salesclerk in a bookstore who accepts the article the purchaser has selected, puts it in a bag and hands it back upon payment of the purchase price. We point out again, that the exemption applicable to § 418 through § 417(2) is not confined to projectionists, but to all employees within the classification. Even though a ticket seller, usher or other employee does not come into physical contact with the film itself, they are furthering the distribution of the prohibited material. Nor do we believe, in the circumstances here, that the juvenile rationale is sufficient to support a reasonable basis. "Distribute" as defined by the statute "means to transfer possession of, whether with or without consideration." Code (1957, 1976 Repl. Vol.) Art. 27, § 417(3). The bookstore employee would not be criminally responsible, absent a conspiracy, for a further sale or distribution of the obscene matter to a third person by the original purchaser, although the original purchaser, if not within the exempted class, would then be subject to the Act. Further, the Legislature has fully covered the disemination of obscene matter of juveniles. Code (1957, 1976 Repl. Vol.) Art. 27, §§ 416A-416G. We do not think that the mere possibility of further distribution after a sale in a bookstore, in itself, warrants the classification. The basic fallacy, however, in the reasoning of the Court of Special Appeals is that the statute cannot be read so that the exemption pertains only to the showing of motion pictures as such. Thus, an usher in the exempted class who distributes to the

theatre patrons a program concerning the film being shown, which program itself constituted obscene matter, would not be subject to the prohibitions of § 418. The bookstore employee, however, or any other person not within the exempted class, who distributed that same program, would be subject to punishment for violation of the statute. Thus, the law operates on some persons and not upon others like situated or circumstanced.

There is, of course, a distinction which may be drawn between obscene motion pictures and other obscene matter.[4] But the Supreme Court has said that "the States have greater power to regulate non-verbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Miller v. California,* 413 U.S. at 26, n.8, 93 S. Ct. at 2616 n.8. It correlated films and pictures with live conduct: "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodations any more than live sex and nudity can be exhibited or sold without limit in such public places." *Id.* at 25-26, 93 S. Ct. at 2616. Therefore, when the governmental objective is to prohibit the distribution of obscene matter, a classification predicated upon control of obscene films and pictures stricter than that imposed on other obscene matter may not be thereby rendered invalid. However, a classification based upon control of obscene films and pictures more lenient than those imposed on other obscene matter certainly could not serve as a rational basis for that classification in light of the governmental objective.

Despite the heavy burden imposed upon Wheeler, he has established that to the extent § 418 prohibits some employees of legal entities from selling, distributing, publishing and printing obscene matter while allowing other employees to do so, it violates the Equal Protection Clause of the Fourteenth Amendment. The statutory discrimination is not based on differences reasonably related to the purpose of the Act in which it is found, and the distinction has no relevance to the purpose for which the classification is made. In the face of the plain language of the statute, to read the exception for salaried theatre employees in § 417(2) to be "limited to the activities of these employees in 'the showing of motion pictures' and not otherwise," as the dissenting opinion would have it, manifestly puts judicial preference before legislative intent, contrary to the firmly established rules of construction. As the classification applicable to § 418 through § 417(2) is without any reasonable basis, it is purely arbitrary. We hold that it is constitutionally invalid. *See Md. St. Bd. of Barber Ex. v. Kuhn,* 270 Md. at 509-510, 312 A.2d 216.

[4] "'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials." Maryland Code (1957, 1976 Repl. Vol.) Art. 27, § 417(1).

V.

The severability clause enacted by Acts 1967, ch. 394, § 2 does not save § 418.[5] *State v. Schuller,* 280 Md. at 318-321, 372 A.2d 1070, is dispositive of the point. We noted the general rule, expressed in *Davidson v. Miller,* 276 Md. 54, 83, 344 A.2d 422 (1975) and *Shell Oil Co. v. Supervisor,* 276 Md. 36, 48, 343 A.2d 521 (1975), that "a court, after finding that a statute is invalid in some respect, will separate the valid from the invalid provisions *wherever possible." Schuller* at 319, 372 A.2d at 1083. We referred to *Police Comm'r v. Siegel, Etc., Inc., supra,* in which we adopted the opinion of the trial court. We quoted from that opinion:

> "'A severability clause does not constitute an absolute or inexorable command; it is merely an

[5] When the law with regard to obscene and other objectionable publications was enacted by Acts 1955, ch. 720, provision was made for severability and was later codified as § 425 of Article 27 of the Maryland Code. The provision disappeared from the Code upon the enactment of Acts 1967, ch. 394. *See* Maryland Code (1957, 1976 Repl. Vol.), Art. 1, § 23.

> aid to interpretation. The test of severability is the effectiveness of an act to carry out, without its invalid portions, the legislative intent in enacting it.'" *Schuller* at 319, 372 A.2d at 1083 (quoting *Siegel,* 223 Md. at 134, 162 A.2d 727).

We pointed to *Siegel,* 223 Md. at 131-134, 162 A.2d 727, *Baltimore v. A. S. Abell Co.,* 218 Md. 273, 290, 145 A.2d 111 (1958) and cases therein cited, as examples of decisions of ours in which we declined to separate the valid from the invalid portions of the statute in the face of a severability clause. We declared:

> "A long established principle of statutory construction in determining severability questions, is that where the Legislature enacts a prohibition with an excepted class, and a court finds that the classification is constitutionally infirm, the court will ordinarily not presume that the Legislature would have enacted the prohibition without the exception, thereby extending the prohibition to a class of persons whom the Legislature clearly intended should not be reached." *Schuller,* 280 Md. at 319, 372 A.2d 1083.

As we have seen, the Legislature in dealing with obscene matter enacted prohibitions with an excepted class. We have found that the classification is constitutionally infirm. If the provision exempting persons from the prohibitions be eliminated, § 418, as it stands, will apply to "any individual, partnership, firm, association, corporation, or other legal entity" as it did before the 1968 amendment. Those persons now exempted would in that way be reached and imprisoned and fined, when, manifestly, the Legislature intended by the amendment that they not be regarded as offending the law even if they engaged in the prohibited conduct. Looking, then, at § 418 in light of § 417(2), we must hold that the Legislature would not have continued the policy indicated by the statute unless those exempted by the 1968 Act were excluded from its operation, and

thereby protected from prosecution. The result is that we may not excise the exemption contained in § 417(2) and applicable to § 418 and leave § 418 standing. Therefore, § 418 must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the exception is § 417(2). This result is in full accord with the rationale of *Connolly v. Union Sewer Pipe Co.,* 184 U.S. 540, 565, 22 S. Ct. 431, 46 L. Ed. 679 (1902), quoted in *Schuller* at 319-320, and cited with approval in *Storck v. Baltimore City,* 101 Md. 476, 486-487, 61 A. 330 (1905). *See also Nutwell v. Anne Arundel Co.,* 110 Md. 667, 672-673, 73 A. 710 (1909), *compare, Greene v. State,* 11 Md. App. 106, 107-111, 273 A.2d 830 (1971). To allow § 418 to stand after serving the exemption provisions, would thwart the purpose of the Legislature, as persons who were clearly intended to be excepted from the provisions of the law will be subject to its prohibitions. A construction leading to such a result cannot be approved. Nor can we properly extend the exemption to include all employees of any legal entity (even with the limitation that they not be officers thereof or have no financial interest therein other than receiving salary or wages), whether or not the legal entity employing them operated a theatre for the showing of motion pictures. That construction of the statute would certainly be at odds with the legislative intent. Under the firmly established rules of statutory construction, such a revision would be properly a matter for legislative determination and impermissible through judicial decision.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT FOR REMAND TO THE CRIMINAL COURT OF BALTIMORE WITH DIRECTION TO DISMISS THE INDICTMENT;

COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

MURPHY, Chief Judge, dissenting:

The Court today strikes down as unconstitutional Maryland's Obscene Matter Act, Maryland Code (1957, 1976 Repl. Vol.), Art. 27, §§ 417(2) and 418, on the ground that these sections violate the equal protection clause of the Fourteenth Amendment. Since the Court finds that the constitutionally offending provisions of § 417(2) are not severable from the basic proscriptions of § 418, Maryland is left without any law inhibiting the distribution or sale of obscene matter, other than to juveniles.[1] Were this result commanded by the Constitution of the United States, or by the Constitution of Maryland, I would, of course, unhesitatingly join the Court's opinion. Since it is not — indeed since the result reached by the Court is so plainly at odds with what I perceive to be the governing law — I must respectfully dissent.

Section 418 provides that any person who sells or distributes obscene matter is guilty of a misdemeanor; § 417(2) provides that § 418 does not apply to a salaried employee of an entity "operating a theatre which shows motion pictures," if the salaried employee has no other financial interest in the theatre. A distinction is thus drawn between employees of bookstores and employees of theatres which show motion pictures.

The Court says that § 417(2) cannot be read to limit the theatre-employee exception to the showing of motion pictures. It, therefore, concludes that a theatre usher who distributes an obscene pamphlet in the course of his employment with the theatre cannot be prosecuted under § 418, while a bookstore who distributes the same obscene pamphlet is subject to prosecution under that section.

What is so obviously intended by the legislature, and so easily gleaned from its language, read in a common sense way, is that the § 417(2) exception for salaried theatre employees is limited to the activities of these employees in the "showing of motion pictures" and not

[1] *See* Maryland Code, Art. 27, §§ 416A — 416G, inclusive.

otherwise. The distribution or sale of obscene pamphlets by a theatre employee is an act separate and distinct from the showing of motion pictures; thus, if such an employee distributes an obsence pamphlet in the theatre, whether connected with the showing of the motion picture or not, he would not be performing a function within the ambit of the exception, and would be subject to prosecution under § 418.

The Court states, quite correctly I think, that a legislative classification which involves, as here, neither a fundamental right nor a suspect class, must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. The Court readily acknowledges that statutes are presumed constitutional and that the equal protection clause does not command that different classes of persons be treated identically and equally in every situation. In properly applying the rational basis test in this case, the Court refers to *Aero Motors v. Adm'r, M.V.A.*, 274 Md. 567, 337 A.2d 685 (1975), where we recognized the following principles:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

In my judgment, the distinction between motion picture theatre employees and other employees drawn by § 417(2) and § 418 rests upon a ground of difference having a fair and substantial relation to the objective of the legislation. As Chief Judge Gilbert so cogently observed for the Court of Special Appeals in affirming the judgment in this case:

> ". . . in a motion picture theatre there is not ordinarily any necessity for an employee, except the projectionists, to handle the film. In fact, it is highly doubtful that anyone other than the projectionist comes in contact with the film itself, and even his contact is limited. A seller of books and magazines can hardly make a sale without in some manner coming into physical contact with the item sold. Furthermore, while controls may be placed so as to regulate the age of all who enter the theatre to see the film, no such controls are present when obscene material, such as the magazine in the instant case, is once removed from the seller's premises. Patently, it is unlikely that a film will be transported from the motion picture establishment so as to become available for viewing by juveniles." 35 Md. App. at 377, 370 A.2d at 606.

It is, of course, the function of a motion picture theatre to show motion pictures to its patrons, and not to distribute printed matter, while the function of a bookstore is to sell books and magazines. A theatre showing motion pictures may regulate who sees what is shown on the screen; the viewer has no means to disseminate the film beyond the confines of the theatre. In contrast, once printed matter is removed from a bookseller's premises, it and its corrupting influence may be distributed and redistributed without limit to anyone, including juveniles. Under § 417(3), a person who "transfer[s] possession" of obscene matter is a distributor subject to prosecution under § 418, as is a person who sells or "prepares, publishes, prints [or] exhibits" such matter. The legislature could properly take into account the remote nature of the contact of the exempted theatre employees with the actual showing of

an obscene film, and rationally conclude that the limited reach of the film did not justify seeking to prevent its exhibition by punishing employees having no direct responsibility for its showing. As we noted in *Matter of Trader,* 272 Md. 364, 399, 325 A.2d 398 (1974), the problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical and unscientific though they may be. That we may think that a legislative classification is unwise, does not justify our striking it down, so long as it is constitutional.

Just this year, the Supreme Court, in *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 97 S. Ct. 1898, 52 L. Ed. 2d 513 (1977), reaffirmed the validity of the rational basis test in equal protection cases. It emphasized that classification in legislation pursuant to the state's police power is a peculiarly legislative task; it said:

> "The decision of the weight to be given the various effects of the statute, however, is a legislative decision, and appellee's position is contrary to the principle that 'the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.' *Dandridge v. Williams,* 397 U.S. 471, 486, [90 S. Ct. 1153, 1162, 25 L. Ed. 2d 491] (1970). . . .
>
> ". . . 'If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78, 31 S. Ct. 337, 55 L. Ed. 2d 369.' *Dandridge v. Williams,* 397 U.S. at 485, 90 S. Ct. at 1161 . . . ." 97 S. Ct. 1909-1910.

Surely, the statutes here meet the test of whether any state of facts can reasonably be conceived that would sustain them. Of course, the mere ability to find fault with a law demonstrates neither its invalidity nor its unconstitutionality. *Matter of Trader,* 272 Md. at 391-392, 325 A.2d 328.

The presumption of a statute's constitutionality can be overcome only by an explicit demonstration by the one attacking it that the classification drawn is invidiously discriminatory. In *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364-365, 93 S. Ct. 1001, 1006, 35 L. Ed. 2d 351 (1973), the Supreme Court said:

> "'A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'"

See also Madden v. Kentucky, 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1940); *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245 (1937). Consistent with this authority, I would consider that the difference in treatment between motion picture theatre employees and other employees is not so irrational as to be invidiously discriminatory on its face.

Assuming, *arguendo*, that the § 417(2) exception violates the equal protection clause, the Court's holding that that provision is not severable from the body of the Obscene Matter Act, and that the entire act, including § 418, must fall, plainly thwarts the legislative intention. The fundamental test of severability is the effectiveness of the statute to carry out the original legislative intent without the invalid provisions. *State v. Schuller*, 280 Md. 305, 372 A.2d 1076 (1977); *Shell Oil Co. v. Supervisor*, 276 Md. 36, 343 A.2d 521 (1975). In view of the Maryland General Assembly's long and consistent history of enacting penal statutes prohibiting the sale and distribution of obscene matter, it is inconceivable to me that it would not want § 418 to retain its vitality, even if § 417(2) was found to be unconstitutional.

In any event, since I think the sections in question fully comport with equal protection principles, I would affirm the judgment of the Court of Special Appeals.

Judge LEVINE has authorized me to state that he concurs with the views expressed herein.

OPINION OF COURT OF SPECIAL APPEALS OF MARYLAND

Decided March 16, 1977.

John W. Wheeler v. State of Maryland

[*No. 725, September Term, 1976.*]

The cause was argued before GILBERT, C. J., and MENCHINE and MOORE, JJ.

Burton W. Sandler for appellant.

Bruce C. Spizler, Assistant Attorney General, with whom were *Francis B. Burch, Attorney General, William A. Swisher, State's Attorney for Baltimore City*, and *Robert Hedeman, Assistant State's Attorney for Baltimore City*, on the brief, for appellee.

GILBERT, C. J., delivered the opinion of the Court.

A jury in the Criminal Court of Baltimore, presided over by Judge Solomon Liss,[1] decided that the magazine entitled "Linda Lovelace, the Star of Deep Throat" was, under contemporary community standards, obscene. In so doing, the jury convicted John W. Wheeler of

[1] Qualified as an Associate Judge of this Court, July 9, 1976.

violating Md. Ann. Code art. 27, § 418, and Judge Liss imposed a fine upon Wheeler of five hundred dollars ($500).

Wheeler has appealed to this Court where he challenges the constitutionality of section 418 on equal protection grounds, and he also contends that the evidence was insufficient to sustain the conviction because there was no showing of scienter on the part of Wheeler.

The factual situation giving rise to this case was simply and straighforward. A detective of the Baltimore City Police Department entered an "adult book store" known as "Swingers Life, Inc.," located in the 1300 block of North Charles Street in Baltimore City where he purchased at random, a copy of the magazine. The detective paid $5.20 to Wheeler, the only employee in the store. Wheeler, who was behind a "podium-type" counter, placed the magazine in a paper bag and handed it to the detective. The detective testified that he did not open the magazine nor look at it until it was delivered to a District Court judge. That judge reviewed it and issued a warrant for Wheeler's arrest for unlawfully distributing obscene material. The detective further stated that he was attracted to the publication by its cover, which indicated clearly, as we have said, that it was concerned with Linda Lovelace.[2] At trial, the State, at the conclusion of the detective's testimony, placed the magazine into evidence without objection.

We shall not endeavor to describe in explicit detail the content of the magazine.[3] Suffice to say that it contained a number of color and black and white photographs of various acts of fellatio, cunnilingus, coitus, and lesbianism, as well as sexual acts being committed by "threesomes." Weighed by sheer number, "threesomes" and fellatio are the prevalent themes.

[2] Miss Lovelace became well-known because of her participation in the controversial motion picture "Deep Throat."

[3] While some may describe it as "earthy," we view it as "mud."

The defense testimony was limited to that of Dr. Lawrence Donner, Associate Professor of Clinical Psychology at the University of Maryland School of Medicine. Doctor Donner told the jury that in his view the magazine did not appeal to "prurient interest." He gave the legal definition of prurient interest as ". . . a secret, morbid, shameful interest in sex, nudity or excretion . . ." while denying that there was a medical definition for that expression. Moreover, Doctor Donner was of the opinion that the magazine did "not lack serious literary value." That "[w]hat is food to one, is to others bitter poison"[4] is apparent from the jury's verdict which did find the publication to be obscene.

THE CONSTITUTIONAL ISSUE

Wheeler perceives something invidious in the Legislature's exempting employees of a motion picture establishment from criminal accountability for the showing of an obscene film but not excluding employees of a bookstore from the scope of criminal sanctions.

With Wheeler's contention in mind, we shall examine the relevant statutes. Md. Ann. Code art. 27, § 418, under which Wheeler was convicted, provides:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

Section 417 states in pertinent part:

> "As used in this subtitle,
>
> (1) *'Matter'* means any book, magazine, newspaper, or other printed or written material or any

[4] Lucretius [Titus Lucretius Carus], *De Rerum Natura*, Book IV, p. 637 (C. Bailey trans.).
D.H. Lawrence in *Pornography and Obscenity* 5 (1929) stated it another way: "What is pornography to one man is the laughter of genius to another."

picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(2) *'Person'* means any individual, partnership, firm, association, corporation, or other legal entity, *but shall not be construed to include an employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theatre which shows motion pictures if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages.*

(3) *'Distribute'* means to transfer possession of, whether with or without consideration." (Emphasis supplied.)

Wheeler reasons that there is no rational basis for the legislative distinction between employees of bookstores and employees of theatres which show motion pictures.

The test which statutes must pass was stated in *Reed v. Reed,* 404 U.S. 71, 75-76, 92 S. Ct. 251, 253-54, 30 L. Ed. 2d 225, 229 (1971), where Mr. Chief Justice Burger, writing for the Court, said:

> "In applying . . . [the Equal Protection C]lause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly,* 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Railway Express Agency v. New York,* 336 U.S. 106 (1949); *McDonald v. Board of Election Commissioners,* 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of

> difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)."

There is nothing in the Equal Protection Clause of the Constitution of the United States that mandates that all persons must be dealt with identically. *Baxstrom v. Herold,* 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). Indeed, as the late Mr. Justice Frankfurter observed in his dissenting opinion *Dennis v. United States,* 339 U.S. 162, 184, 70 S. Ct. 519, 526, 94 L. Ed. 734, 749 (1950), ". . . there is no greater inequality than the equal treatment of unequals." What the Equal Protection Clause does command, however, is that distinction between classes of persons must ". . . have some relevance to the purpose for which the classification is made." *Baxstrom v. Herold, supra* at 111, 86 S. Ct. at 763, 15 L. Ed. 2d at 624. *See also Bush v. Director,* 22 Md. App. 353, 367, 324 A.2d 162, 171, *cert denied,* 272 Md. 745 (1974). The law is, as Mr. Justice Douglas penned in *Norwell v. Illinois,* 373 U.S. 420, 423, 83 S. Ct. 1366, 1368, 10 L. Ed. 2d 456, 459 (1963), that, "Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment."

In *McGowan v. Maryland,* 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393, 399 (1961), *aff'g McGowan v. State,* 220 Md. 117, 151 A.2d 156 (1959), the Court said:

> "Although no precise formula has been developed, the Court had held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws

> result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

See also Matter of Trader, 272 Md. 364, 386-87, 325 A.2d 398, 410 (1974).

Applying the test of *Reed* and *McGowan* to the instant case, we note that in a motion picture theatre there is not ordinarily any necessity for an employee, except the projectionists, to handle the film. In fact, it is highly doubtful that anyone other than the projectionist comes in contact with the film itself, and even his contact is limited. A seller of books and magazines can hardly make a sale without in some manner coming into physical contact with the item sold. Furthermore, while controls may be placed so as to regulate the age of all who enter the theatre to see the film, no such controls are present when obscene material, such as the magazine in the instant case, is once removed from the seller's premises. Patently, it is unlikely that film will be transported from the motion picture establishment so as to become available for viewing by juveniles.

The legislature is afforded the widest discretion in determining which evil it seeks to ferret out of society. It may attack some and let others stand, recognizing that an assault mounted on a broad front against all evil might fall short, while a cannonade directed toward a smaller manifestation of evil would meet with more success. Such judgment on the part of a legislative body ". . . is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious." *McLaughlin v. Florida,* 379 U.S. 184, 191, 85 S. Ct. 283, 288, 13 L. Ed. 2d 222, 228 (1964). *See also Bowie Inn v. City of Bowie,* 274 Md. 230, 335 A.2d 679 (1975); *Bush v. Director, supra.*

We think section 418 to be constitutional in that there is a rational basis for the legislative distinction between employees of bookstores and employees of motion picture theatres. So long as there is a rational basis for

the distinction, the statute is valid. *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); *Prince George's County v. McBride,* 268 Md. 522, 302 A.2d 620 (1973); *Administrator v. Vogt,* 267 Md. 660, 299 A.2d 1 (1973). *Giant of Maryland, Inc. v. State's Attorney,* 267 Md. 501, 298 A.2d 427, *appeal dismissed,* 412 U.S. 915, 93 S. Ct. 2733, 37 L. Ed. 2d 141 (1973), *appeal after remand,* 274 Md. 158, 334 A.2d 107 (1975); *Bush v. Director, supra; Hughes v. State,* 14 Md. App. 497, 287 A.2d 299, *cert. denied,* 409 U.S. 1025, 93 S. Ct. 469, 34 L. Ed. 2d 317 (1972); *Dean v. State,* 13 Md. App. 654, 285 A.2d 295 (1971).

We repeat what Chief Judge Murphy said for the Court of Appeals in *Matter of Trader, supra* at 399, 325 A.2d at 416-17:

> "Of course, in evaluating challenges under the equal protection clause, we do not sit as a 'super legislature or a censor.' *Salsburg v. Maryland, . . . 346 U.S. at 550. . . . 'To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations, — illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago,* 288 U.S. 61, 69-70, 33 S. Ct. 441, 4443, 57 L. Ed. 730 (1913). In other words, if legislation is constitutional, the wisdom of it is beyond the purview of the Courts. *Bruce v. Director, Chesapeake Bay Aff.,* 261 Md. 585, 276 A.2d 200 (1971)."

Moreover, as in *Trader,* there is nothing in the record before us to show that legislative distinction between employees of theatres, section 417(2), and of other business establishments, section 418, is arbitrary, unreasonable, discriminatory, or unrelated to a valid State objective. The ". . . constitutionality is presumed in the absence of a clear and convincing showing by the party assailing the legislative classification that it

does not rest upon *any* reasonable basis, but is essentially arbitrary." *Matter of Trader, supra*, 272 Md. at 400, 325 A.2d at 417. Wheeler did no more than point to the phraseology of sections 417 and 418 and concluded that on their face they denied equal protection. On their face, they do not, for the reasons we have already stated.

Arguments of counsel that statutes discriminate are not evidence of unlawful discrimination. Wheeler failed to show by clear and convincing evidence that there is no rational basis for the difference in treatment between section 417 and section 418.

We hold, on the basis of the record before us, that Wheeler was not denied equal protection of the law, and that Md. Ann. Code art. 27, § 418 is constitutional.

SCIENTER

Judge Moylan, for this Court in *Woodruff v. State*, 11 Md. App. 202, 273 A.2d 436 (1971), made clear that in order for a conviction under section 418 to be sustained, scienter on the part of the accused must be shown by the State. Such knowledge may, however, be either direct or indirect, and general as well as specific. There is no requirement that the State undertake the impossible by endeavoring to prove that a defendant in an ". . . obscenity case has personally read from beginning to end all of the material offered by him for sale." *Id.* at 228, 273 A.2d at 450.

Md. Ann. Code art. 27, § 417(4) defines "knowingly" as "having knowledge of the character and content of the subject matter." Such a definition satisfies, constitutionally, the scienter element of an obscenity crime. Contrary to what Wheeler asserts, the accused need have no knowledge that the offending material is itself obscene, as that determination is a question of law. *Rosen v. United States*, 161 U.S. 29, 41-42, 16 S. Ct. 434, 438, 40 L. Ed. 606, 610 (1896).

More recently, Mr. Justice Rehnquist, speaking for the Court in *Hamling v. United States*, 418 U.S. 87, 123,

94 S. Ct. 2887, 2910-11, 41 L. Ed. 2d 590, 624 (1974), reiterated:

> "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law."

See also Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968); *Mishkin v. New York*, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966); *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959).

Whether a sale is made with knowledge of the character and content of the subject matter is determined by the totality of the circumstances, and not, as appellant argues, by proving that appellant actually read the matter which turned out to be obscene. This rule is well delineated in *Woodruff v. State, supra* at 228, 273 A.2d at 450-51.

We believe the evidence adduced by the State was sufficient, if believed, as it obviously was, for the jury reasonably to infer that Wheeler knew or had notice of the contents of the magazine. By his sale of the matter, Wheeler assumed responsibility for it and must abide the consequences.

Judgment affirmed.
Costs to be paid by appellant.